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THE CONSIDERATION OF A CONTRACT.

No. I.

§ 1.—Every parole contract, to be legally binding, must be supported by a consideration.[1] Benefit to the one party, or injury to the other, is as indispensable to its validity as their mutual assent or legal competency.

However deliberately made, and obligatory in morals, it will not, unless authenticated by a seal, be recognized and enforced at law or in equity. This doctrine is of such high antiquity in the common law that no learning can find its origin.[2] It is enunciated in the year books,[3] and illustrated by a multitude of cases in the succeeding English Reports.[4]

It is as thoroughly inwrought in the common law of the United States as of England.[5] It has been transferred to the courts of equity in both countries, where it remains in full force.[6] Its analo-

[1] 2 Bla. Comm. 445; Doct. & Stu. Dial. 2, c. 24.

[2] Bracton de leg lib. 3, cap. 1, fol. 99.

[3] 11 Hen. 4, 33, 23, a.; 17 ed., 4, 4; 3 Hen. 6, 36.

[4] Eastwood *vs.* Kenyon, 11 A. & E. 438.

[5] 2 Kent Comm. 463.

[6] 1 Fonb. Eq. 348; 2 Story Eq. Juris., § 793, a., 973, 987.

gies have been traced in other systems of jurisprudence, ancient and modern. It is said to be "echoed from the civil law,"[1] which applied to commercial transactions the familiar maxim, "*Ex nudo pacto non oritur actio.*"[2] But the *nudum pactum* of the civil law was not synonymous with the voluntary promise which the common law leaves solely to the conscience of the maker to fulfill. It designated those engagements, oral and written, which were of no legal effect, not having been invested with the prescribed solemnities. But whenever they were entered into and ratified in the presence of a magistrate, with certain formal interrogatories and replies, they were presumed to be matured with deliberation, and became binding in law, notwithstanding the duties they imposed on the one party were to be recompensed by no service or reward by the other.[3] The commercial law of the Continent of Europe recognizes the principle that "an obligation without a cause, or with a false or unlawful cause, can have no effect;" but will not allow agreements without consideration to be questioned which have been duly ratified in the presence of witnesses or a public notary.[4] Civilians, it is said, use the word *causa* in the same sense as the word consideration in the jurisprudence of England and the United States.[5]

§ 2.—*The reason and policy of requiring a consideration.*—A consideration has been said to be necessary to sustain a parol promise, since it is requisite evidence of the promise itself.[6] Most commonly the rule which requires it, is said to have been established to protect parties from the consequences of inconsiderate engagements. Parol promises are liable to be made without reflection, and should not be enforced unless the service promised by the one

[1] Pillans *vs.* Mierop, 3 Burr. 1670, per Wilmot, J. [2] 2 Bla. Comm., 445.

[3] Addison on Cont., 2, 3. The old error that the *nudum pactum* of the civil law and the gratuitous promise of the common law are synonymous, is now exploded. See 1 Fonb. Eq. Bk., 1, ch. 5, § 1, and a learned article on the *Nudum Pactum*, in the English Law Review, May, 1849.

[4] Code Civile, Lib. 3, Tit. 3, § 4; Pothier, (Evans,) 42; Civil Code of Louisiana, Art. 1887; Addison on Cont., 4.

[5] Mouton *vs.* Noble, 1 La. Ann., 192; Sharington *vs.* Stratton, Plowden, 309, (a.) This is denied in the article cited above from the English Law Review.

[6] Pillans *vs.* Mierop, 3 Burr. 1669, per Lord Mansfield.

party is to be remunerated by the other. On the contrary, it is said a promise, contained in a sealed instrument which itself gives evidence of reflection, requires no consideration to sustain it.[1] The reason may be historically correct, and even now a written promise implies more deliberation than a moral promise; but in reality, under the existing usages of society, a sealed promise implies no more than a written promise not under seal.

§ 3.—It seems to us that, whatever be the origin of this rule of law, it rests on a sounder reason. If we understand its nature and bearings, it is based on the right of property and the functions of civil government. The great office of the law is to secure to every individual that which is his own, whether in life, limb or estate. The protection of persons, and of their rights of property, and the conservation of social order, and not the enforcement of the decalogue is the business of the civil magistrate. If one wrongfully seize upon and appropriate to his own use any portion of another's property by force or fraud, the law will compel the aggressor to restore it. It will also compel a person who has received a certain portion of another's property, on condition of replacing it with a corresponding value, to perform the condition. If he were at liberty to neglect its performance, the other's right of property would be injured to as great an extent as if it had been seized by force, inasmuch as he intended to part merely with a special representative of value, and not with the value itself.

Here the law stops. If an individual has parted with no value, or has parted with it without the expectation or condition of having it replaced, his right of property is not invaded when the law refuses to enforce promises made to him gratuitously. They are mere moral obligations, binding on the conscience, which it is not the office of civil government to execute. The consideration need not amount to an equivalent in value—but it must be remembered that the law abides by general principles with wide boundaries, which on the whole work out their intended results. If the reason which

[1] Sharington *vs.* Stratton, Plowden, pp. 308, (a), 309; Shep. Touch., (Preston,) pp. 224, 225; Doct. & Stu. Dial. 2, c. 24; Addison on Cont., p. 5.

supports the rule is sound, the policy which dictates adherence to it is wise.

The enforcement of gratuitous promises would be followed by the most mischievous consequences to society. The courts would be crowded with interminable litigation. The voluntary engagements of insolvent debtors would prejudice the just and meritorious claims of actual creditors. Assignees, executors and administrators would meet with new difficulties in distributing the property committed by law to their charge.[1] These remarks are induced by the unfavorable criticism to which the rule is not unfrequently subjected.[2]

§ 4.—*The relation of the consideration to the contract.*—In every contract there are in fact two considerations. This is illustrated by mutual contemporaneous promises. If you offer me $100 for a watch, and I, accepting your offer, promise to give you the watch for the money, a valid contract is created. The money to be paid is the consideration of the promise to part with the watch, and the watch to be delivered is the consideration of the promise to part with the money.

§ 5.—The consideration of a promise may consist of some benefit to the party making it, or some injury to the party to whom it is made.[3] It may consist of some benefit conferred on a third person at the request of the party making the promise, who may himself receive none whatever, either from the beneficiary or from the party to whom it is made.[4] An equal injury results to the promisee whether he confers the benefit on the promisor or on a third person.[5] Promises supported by a consideration moving to a third person occur most frequently when the promisor guarantees or ensures the debt of another, either contemporaneously with or subsequently to its creation. If it be made contemporaneously, no

[1] Eastwood *vs.* Kenyon, 11 Ad. & E. 438; S. C., 2 P. & D., 276; Story Bailm. § 169.

[2] 1 Fonb. Eq., 337, note; English Law Review, May, 1849, Art. *Nudum Pactum*; Fitch *vs.* Redding, 4 Sandf., 130, per Duer, J.

[3] Com. Dig. Ass. B. 1; Pillans *vs.* Mierop, 3 Burr. 1673; Nerot *vs.* Wallace, 3 T. R. 24; Bunn *vs.* Guy, 4 East, 194.

[4] Morley *vs.* Boothby, 3 Bing. 113.

[5] Violet *vs.* Patton, 5 Cranch, 150.

other consideration for the collateral promise need be shown than that for the debt itself, it being conclusively presumed that the credit would not have been given without the additional security.[1] But if the guaranty be of some previously existing debt, some new consideration, as forbearance by the creditor, must be shown to render it valid—for without such new consideration the creditor would sustain no damage and the debtor receive no benefit.[2]

§ 6.—*Contracts which require a consideration.*—All contracts, not under seal, whether written or oral, require a consideration. In 1765, Mr. Justice Wilmot was strongly of opinion, and Lord Mansfield apparently so, that a written promise, not under seal, carrying with it the evidence of deliberation, required no consideration ;[3] but their opinion is now in conflict with all approved authority.[4] There is no difference between an oral and a written promise not under seal, and both are classed together under the head of simple or parole contracts.[5]

§ 7.—Bills of exchange and promissory notes are governed by the same rules as other parole contracts, with certain peculiar modifications. They require a consideration to sustain them when matters of suit between immediate parties. The drawer of a bill cannot recover against the acceptor—the payee of a note against the maker—or the indorsee of either a bill or note against his immediate indorser, unless the bill or note passed to him for a valuable consideration.[6] A want of consideration or any other equities

[1] Brown *vs.* Garbrey Gould, 94 ; Kirby *vs.* Coles, 3 Cro. Eliz. 137 ; Stadt *vs.* Lill, 9 East, 348 ; Leonard *vs.* Vrendenberg, 8 Johns. 29 ; Bailey *vs.* Freeman, 11 Id. 221 ; Tenny *vs.* Prince, 4 Pick. 385.

[2] 1 Saunders (Williams) 211, *note;* Thacher *vs.* Dinsmore, 5 Mass. 301 ; Parker *vs.* Carter, 4 Munf. 273 ; Bigler *vs.* Ream, 3 Penn. 283 ; Payne *vs.* Wilson, 7 B. & C. 423 ; Croft *vs.* Beale, 5 Eng. Law & Eq. 408.

[3] Pillans *vs.* Mierop, 3 Burr. 1669–1671.

[4] Rann *vs.* Hughes, 7 T. R. 351 ; 4 Taunt. 117 ; 1 Saund. 211, *note* (2) ; Burnet *vs.* Blisco, 4 Johns. 235 ; The People *vs.* Howell, 4 Id. 303 ; Cooke *vs.* Bradley, 7 Conn. 51 ; Brown *vs.* Adams, 1 Stewart, 51 ; Bean *vs.* Burbank, 16 Maine, 459.

[5] Rann *vs.* Hughes, 7 T. R. 351, *note;* Beckham *vs.* Drake, 9 M. & W. 79 ; Ballard *vs.* Walker, 3 Johns. Cas. 65.

[6] Jackson *vs.* Warwick, 7 T. R. 121 ; Darnell *vs.* Williams, 2 Stark, 166 ; Jones *vs.* Hibbert, 2 Id. 304 ; Herrick *vs.* Carman, 10 Johns. 224 ; Hill *vs.* Ely, 5 S. & R. 363 ;

attaching to the bill or note between the immediate parties, will defeat a recovery by a subsequent holder to whom it passed for a valuable consideration after it became due,[1] or after actual or constructive notice of the infirmity,[2] or otherwise not in the ordinary course of business.[3] These incidents are allowed by the law to determine the commercial character of such instruments in accordance with the actual or supposed intention of the parties.

§ 8.—The unimpeded circulation of negotiable paper is so necessary in commercial life, that bills and notes are awarded peculiar privileges, which enable those who purchase them for valuable consideration to rely on the credit of all the previous parties, without inquiring into their business relations among themselves; but the rule must be taken subject to the conditions just stated. If they have passed into the hands of a *bona fide* holder for value before maturity, no infirmity unknown to him when he purchased them, arising from want, failure or illegality of consideration, whether existing in the inception of the bill or note, or created at any time before the transfer to him, not even the theft of the indorser can be alleged in bar of an action brought by him against any prior party.[4] So if such *bona fide* holder indorses a note, any prior equities which existed between the parties before its transfer to him cannot prejudice the rights of this indorsee, notwithstanding the indorsee had notice of them when he received the note; for otherwise, the rights

Hill *vs.* Buckminster, 5 Pick. 391; Story, Prom. Notes, § 390; 3 Kent Comm. 80. There are early dicta which seem to imply that bills and notes require no consideration to sustain them. Pillans *vs.* Mierop, 3 Burr. 1669, per Lord Mansfield; 2 Bla. Comm. 446.

[1] Taylor *vs.* Mather, 3 T. R. 83, *note;* Ayer *vs.* Hutchins, 4 Mass. 370; Stockbridge *vs.* Damon, 5 Pick. 223; Sargent *vs.* Southgate, Id. 312; Thompson *vs.* Hall, 6 Id. 229; Tucker *vs.* Smith, 4 Greenl. 415.

[2] Steers *vs.* Lashley, 6 T. R. 61; Wiffen *vs.* Roberts, 1 Esp. 261; Lovell *vs.* Martin, 4 Taunt. 799; Amory *vs.* Merryweather, 2 B & C. 573; Skilding *vs.* Warren, 15 Johns. 270; Perkins *vs.* Challis, 1 N. H. 254.

[3] Munroe *vs.* Cooper, 5 Pick. 412; Aldrich *vs.* Warren, 16 Maine, 465; Story, Prom. Notes, § 190; 3 Kent's Comm. 80.

[4] Miller *vs.* Race, 1 Burr. 452; Grant *vs.* Vaughan, 3 Id. 1516; Peacock *vs.* Rhodes, 2 Doug. 633; Solomons *vs.* The Bank of England, 13 East, 135; Aldrich *vs.* Warren, 16 Maine, 465; Wheeler *vs.* Guild, 20 Pick. 545; Clark *vs.* Ricker, 14

of such *bona fide* holder would be unjustly impaired.[1] Nor will it avail the maker of an accommodation note in an action brought by an indorsee, who gave value for it, before it was due, to prove that the indorsee knew it to be an accommodation note—such a note being designed to circulate like any other negotiable paper which rests on a valid consideration between the original parties.[2] These remarks must be confined to those bills and notes which are properly commercial, being negotiable, unconditional and payable in money.[3] The privileges allowed to the holders of such paper in *proving* the consideration, will be noticed under another head.

§ 9.—The rule of law which renders a consideration indispensable to the validity of a parole contract, does not apply to sealed instruments, as bonds, deeds, &c.[4] They are said to "*import* a consideration,"[5] but this expression seems to mean nothing more than that they require none. It has doubtless been adopted so as to class together and apply to all contracts, sealed and unsealed, by means of a fiction,—the rule that a consideration is necessary to their validity. Want or failure of consideration has been allowed in some American States by statute or local usage to invalidate sealed agreements;[6] and with deference it is submitted, that the arbitrary rule which originated when written agreements were generally sealed, and now allows the impression of a wafer or scrawl to change the general policy of the law, has lost its efficacy in promoting the ends of justice. A single exception is said to exist to

N. H. 44. But when declared absolutely void by statute, they are void even in the hands of innocent holders. Story's Notes, § 192; 3 Kent's Comm. 79, 80; Hay *vs.* Ayling, 3 Eng. Law & Eq. 420; Unger *vs.* Boas, 13 Penn. State (1 Harris) 601.

[1] Chalmers *vs.* Lanion, 1 Camp. 383; Thompson *vs.* Shepherd, 12 Met. 311; Story's Notes, § 191.

[2] Ireland *vs.* Beresford, 6 Dow. 237; Fentum *vs.* Pocock, 5 Taunt. 192; Lincoln *vs.* Stevens, 7 Met. 529; Grandin *vs.* Levoy, 2 Paige, 509; Powell *vs.* Waters, 17 Johns. 176.

[3] Story's Notes, §§ 17–27.

[4] Sharington *vs.* Stratton, Plowden, 308; Addison on Cont. 5; see Morley *vs.* Boothby, 3 Bing. 111.

[5] Sharington *vs.* Stratton, Plowden, 308; 2 Kent's Comm. 264.

[6] N. Y. R. S. vol. ii. p. 406, § 77, 78; Indiana R. S. p. 451; Swift *vs.* Hawkins, 1 Dall. 16; Solomon *vs.* Kimball, 5 Binney, 232; Case *vs.* Boughton, 11 Wend. 116; Leonard *vs.* Bates, 1 Blackf. 172.

the rule we have stated. Contracts under seal, stipulating for a reasonable restraint of trade, must have a consideration.[1]

§ 10—*The Proof of a Consideration.*—The consideration of an oral promise may be proved by written or parole evidence. Written contracts, so far as proof of the consideration is concerned, are susceptible of a division into those which are put in writing, at the option of the parties and those which, to be valid, are required to be put in writing by statute.

The consideration of written contracts of the first class not under seal, may be proved by parole evidence, or collected from the circumstances of the case, and it must be averred when they are matters of suit.[2] They are not in general ever presumed to be founded on a consideration, unless on the face of them one either appears or is stated to exist.[3] But, unlike other unsealed instruments, negotiable paper is favored with this presumption, and is presumed to have been delivered for a valuable consideration, both in its original inception and subsequent indorsement.[4] The burden of proof may be cast on the holder by proving force or fraud in the inception or issue of the bill or note, to which he was not privy.[5]

[1] Mitchel *vs.* Reynolds, 1 P. W. 181; Homer *vs.* Ashford, 3 Bing. 322.

[2] Twingley *vs.* Cutter, 7 Conn. 291; Arms *vs.* Ashley, 4 Pick. 71; Bean *vs.* Burbank, 16 Maine, 451; Cummings *vs.* Dennett, 26 Id. 397; Patchin *vs.* Swift, 21 Vt. 292; Thompson *vs.* Blanchard, 3 Comst. 335; Monton *vs.* Noble, 1 La. Ann. 192; Powell on Cont. 368. *Contra*, Morley *vs.* Boothby, 3 Bing. 112, Best, C. J.

[3] Whitney *vs.* Stearns, 26 Maine, 394; Bean *vs.* Burbank, Id. 459; Sloane *vs* Gibson, 4 Miss. 33; Thompson *vs.* Blanchard, 3 Comst. 339; Bronson C. J.

[4] Collins *vs.* Martin, 1 B. & P. C., 648; Solomons *vs.* Bank of England, 13 East. 135; Thompson *vs.* Blanchard, *supra*, 1 Selwyn, N. P. 42; Story Notes, § 181, 3 Kent's Comm., 79; Jennison *vs.* Stafford, 1 Cush. 168. This privilege is awarded to promissory notes in Ohio, even though contingent and not negotiable, if payable in money. Dugan *vs.* Campbell, 1 Hamm. 118; Ring *vs.* Foster, 6 Id. 280. But not when payable in specific articles and amounting to a special contract. Niswanger *vs.* Staley, 8 West. Law Jour., 493.

[5] Reynolds *vs.* Cheetle, 2 Camp. 596; Munroe *vs.* Cooper, 5 Pick, 212; Aldrich *vs* Warren, 16 Maine, 465; Cruger *vs.* Armstrong, 3 Johns, Cas. 5; Conroy *vs.* Warren, Id. 259; Bailey *vs.* Bidwell, 13 M. & W., 73, 3 Kent. Comm., 79. In Wyer *vs.* The Dorchester and Milton Bank, a case not yet reported, it was recently held by the Supreme Court of Massachusetts, that the case of bank bills, stolen from the bank, was an exception to this rule. See Bank of Louisiana *vs.* U. S. Bank, 9 Martin, 398; Hope Bridge Co. *vs.* Perry, 11 Ill. 467.

It has been held that another and different consideration from that stated in a deed or an additional one, even in a parole written contract, unless expressed on its face to be "for other considerations," cannot be averred, and this on the ground that the written agreement would otherwise be varied by evidence *aliunde*.[1] But this doctrine is now decidedly against the weight of American authority, and parole evidence is admissible to prove the consideration of a deed or other written contract in which none is expressed, or to prove another and different one from that expressed, or to contradict the receipt of the consideration acknowledged in the deed.[2]

§ 11.—The second class of written contracts—those which, to be valid, must be in writing, present the vexed question whether the consideration of those contracts to which the statute of frauds denies legal validity, unless reduced to writing may be proved by parole evidence.[3] A promise which the statute requires to be in writing, as well as one which it does not, must have a consideration. It merely adds a further requisite to certain contracts which prior to its enactment required a consideration.[4]

§ 12.—Public policy seems to require that the classes of promises enumerated by the statute should not be enforced, unless made under circumstances of peculiar deliberation, and proved by more reliable evidence than the uncertain testimony of witnesses to unwritten declarations.[5] If to effect this requirement of public policy

[1] Howes *vs.* Baker, 3 Johns, 506; Maigley *vs.* Hauer, 7 Id. 341; Leonard *vs.* Vrendenberg, 8 Id. 29; Schermerhorn *vs.* Vanderheyden, Id. 139; Shepherd *vs.* Little, 14 Id. 210; Bowen *vs.* Bell, 20 Id. 338; Elliott *vs.* Giese, 7 H. & J. 457; Emery *vs.* Chase, 5 Greenl. 132; Cutter *vs.* Reynolds, 8 B. Monrs. 596.

[2] Tyler *vs.* Carlton, 7 Greenl. 175; Emmons *vs.* Littlefield. 13 Maine, 233; Willson *vs.* Betts 4 Denio, 101; McCrea *vs.* Purmount, 16 Wend. 460; Frink *vs.* Green, 5 Barb. 455; Livermore *vs.* Aldrich, 5 Cush. 431; White *vs.* Miller, 22 Vt. 380; Sedgwick on Dam, 172, 174.

[3] 29 Car. 11 ch. 3 § 4, adopted substantially in all American States. 2 Kent. Comm. 510, 1 Greenl. Ev. § 262, 274.

[4] Rann *vs.* Hughes, 7 T. R., 351; 2 Stark Ev. 341.

[5] 1 Greenl. Ev., § 262 and note, where similar protective statutes are cited. The same policy dictates the requirement by statute of a written promise to revise a debt—barred by the statute of limitations or by bankruptcy.

be the sole purpose of the statute, as gathered from its general scope and particular terms, the simple affirmation of the party to be charged, referring definitely to the subject matter, seems to be all that need be reduced to writing. The promise "I guaranty the debt of B to C," is more deliberate when written than when merely spoken, and is not less deliberate than the written promise "I guaranty the debt of B to C in consideration of C's forbearance to sue B." True it is, that a consideration must still be proved by parole evidence, if it is not written—but the introduction of such evidence would not conflict with the purpose of the statute as we have stated it. Even if the consideration also were required to be in writing, parole evidence could not then be dispensed with. The agreement by the statute need only be signed by the party to be charged—but in order to bind him, parole evidence may and in many cases must show, among other things, that the consideration has been performed, if its performance was to precede the fulfillment of the promise. If we go further than requiring merely the promise to be in writing, and require the consideration also to be written, on the same principle we must shut out parole evidence of the obligation resting on the party from whom the consideration moved, to perform it, and its faithful discharge, of the mutual assent of the contracting parties and of every element necessary to constitute a valid contract. The construction here given answers the terms of the statute which invite a liberal construction, requiring "the agreement or some note or memorandum thereof" to be in writing. The word "*agreement*" is used in the statute as synonymous with promise, which is its popular signification. In law books it is not used as including a consideration, except in defining such an one as the law will enforce—but agreements are classed not unfrequently as "valid" and "invalid," "legal" and "illegal."

§ 13.—The case, which first raised the point under discussion, occurred one hundred and twenty-eight years after the enactment of the statute,[1] prior to which case Lord Eldon said he always supposed the law clear: that if a man agreed in writing to pay the debt

[1] Wain *vs.* Walters, 5 East, 10.

of another, it was not necessary that the consideration should appear in writing.[1]

The English decisions, after no little conflict of opinion,[2] settled the doctrine of *Wain* vs. *Walters*, requiring the consideration of all agreements included within the fourth section to appear in writing, either by express statement or just implication.[3]

The decisions proceeded to a certain extent, on the ground that as the agreement must be in writing, the consideration, which is one of its material parts and is indispensable to its recognition in courts of justice, should also be in writing, for otherwise parol evidence would add a necessary element, and thus open the way to the perjuries which the statute was intended to prevent. They, however, rested mainly on the assumption that the word agreement *e vi termini* includes a consideration which must therefore be reduced to writing.

Accordingly, it was held, in construing the seventeenth section in which the words "*bargain*" and "*contract*" alone were used, that the consideration need not be expressed.[4] Either construction satisfies the terms of the statute, and will be adopted accordingly, as it is supposed to be more or less extensive in its design, and is regarded with favor or distrust by the Courts. The English rule has been adopted in New York,[5] Maryland[6] and Georgia,[7] and re-

[1] Ex parte Gordon, 15 Vesey, 286.

[2] Ex parte Minet, 14 Vesey, 190; ex parte Gordon *supra;* Morris *vs.* Bromley, Holt N. P. 153; Goodman *vs.* Chase, 1 B. & Al. 299.

[3] Saunders *vs.* Waterfield, 4 B. & Al. 295; Jenkins *vs.* Reynolds, 3 B. & B. 14, S. G. 6 Moore, 681, and cases cited in notes to ex parte Minet, 14 Vesey, (Sumner's ed.) 190.

[4] Egerton *vs.* Matthews, 6 East. 307. Also, it has been held in New York, where the English rule has been adopted, that where a statute required an "undertaking" to be in writing, the consideration need not be expressed. Thompson *vs.* Blanchard, 3 Comst. 335.

[5] Sears *vs.* Brink, 3 Johns. 210; Leonard *vs.* Vrendenbergh, 8 Id. 29; Rogers *vs.* Kneeland, 10 Wend. 218; Parker *vs.* Wilson, 15 Id. 343; Bennett *vs.* Pratt, 4 Denio, 275; Staats *vs.* Howlett, 4 Id. 559; D. Wolf *vs.* Rabaud, 1 Peters, 499.

[6] Wyman *vs.* Gray, 4 H. & J. 409; Eliott *vs.* Giese, 4 Id. 458; Edelen *vs.* Gough, 5 Gill. 103. But see Brooks *vs.* Dent, 1 Mary. Ch. Decis. 523.

[7] Henderson *vs.* Johnson, 6 Geo. 390.

cognized in New Hampshire;[1] but it has been gradually frittered away in New York till it has been held that the words "for value received" are a sufficient expression of the consideration.[2] In other States parol evidence has been held admissible to prove it, and this doctrine has been sanctioned by the weight of American authorities.[3] The same construction has been followed in one or two cases because the statute uses the word "*promise*" instead of "*agreement*,"—as in Virginia, Tennessee and Mississippi.[4]

§ 14.—Where a promise to pay the debt of another, which is within the statute, is collateral to the principal contract, and being made at the same time and forming part of the same transaction, becomes an essential ground of the credit given to the principal debtor, no other consideration need be shown for the guaranty than that for the original debt; and this may be proved by parol evidence under those governments where the consideration is required to be in writing. But they require some other consideration to exist and appear in writing, if it is the guaranty of a previously existing debt.[5]

§ 15.—*Parties to the consideration of a contract, and their rights and liabilities.*—The consideration of a promise, as has been seen, may consist of a benefit conferred on the promissor or on a third person at his request. If the benefit is conferred by the party to

[1] Neelson *vs.* Sanborne, 2 N. H. 414.

[2] Watson *vs.* McLaren, 19 Wend. 557; S. C. 26 Id. 425; Douglas *vs.* Howland, 24 Id. 35; Edelen *vs.* Gough, 5 Gill. 103.

[3] Packard *vs.* Richardson, 17 Mass. 122; Levy *vs.* Merrill, 4 Greenl. 180; Cummings *vs.* Desmett, 26 Maine, 397; Sage *vs.* Wilcox, 6 Conn. 81; Miller *vs.* Irvine, 1 Dev. N. C. 103; Tufts *vs.* Tufts, 3 W. & M. 456; How *vs.* Kimball, 2 McLean, 103; Reed *vs.* Evans, 17 Ohio, 128; Buckley *vs.* Beardsley, 2 South. 570. The contrary was held in South Carolina in Stephens *vs.* Winn, 1 N. & M. 370, but overruled in Lecat *vs.* Yard, 2 McCord, 188; Tyler *vs.* Givens, 3 Hill. 480; Woodward *vs.* Picket, Dudley, 30.

[4] Violet *vs.* Patton, 5 Cranch 142; Taylor *vs.* Ross, 3 Yerg. 330; Wren *vs.* Pearce, 4 S. & M. 91; Thompson *vs.* Blanchard, 3 Comst. 335.

[5] Leonard *vs.* Vrendenbergh, 8 Johns., 29; Nelson *vs.* Dubois, 13 Id., 175; Rogers *vs.* Kneeland, 10 Wend. 218; S. C., 13 Id. 114; Brown *vs.* Curtis, 2 Comst., 225; Story Notes, § 457; 3 Kent. Comm., 122, 123; Stadt *vs.* Lill, 9 East, 348; Newberry *vs.* Armstrong, 6 Bing. 201.

whom the promise is made, and he is to receive the benefit of the promise, he can, doubtless, enforce it, as he is both a party to the consideration and the promise. But questions of difficulty arise where the party who is to receive the benefit of the promise is a stranger to both the consideration and the promise, or to either. The rules relative to them are somewhat arbitrary, and not rested on any general principles of jurisprudence. They have been variously stated by different courts and commentators on the law. By some it is stated, as a general rule, that the beneficiary or third party for whose benefit a promise is made cannot sue upon it, at least in his own name, at law,[1] and by others that he can—though the consideration does not move from him.[2] By others it is said, he cannot sue unless he was privy to the original contract or the promissee is his agent—denying his right to sue when he is an entire stranger to the consideration.[3] In the early cases it was generally held that the party from whom the consideration moved, and to whom the promise was made, could alone bring the action.[4] The beneficiary was allowed to sue in one or two instances—either because he performed the meritorious service, which constituted the consideration or was related to the promisee, as when a promise was made to a parent for the benefit of his son or daughter, the latter was allowed to sue.[5] In others the suit was sustained, the promisee being regarded as the plaintiff's agent.[6] In modern cases it has been held that the third party could bring the action, provided he was privy to the contract—and different rules have been adopted to determine this privity. Where money has been paid by one party to another for the benefit of a third party, that third party has not been allowed to sue, unless he previously assented to the payment, and his right to the money became so fixed that it was at his risk and

[1] Hammond on Parties, (11 Am. Ed.,) 101. [2] 22 Am. Jurist, 17.

[3] Chitty Cont., (6 Am. Ed.,) 53; W. W. Story Cont., § 450.

[4] Crow *vs.* Rogers, 1 Str., 592; Delabor *vs.* Gold, 1 Keb. 44, 121; Bourne *vs.* Mason, 1 Vent., 6; S. C., 2 Keb., 457, 527.

[5] Dutton *vs.* Poole, 1 Vent. 318, 322; S. C., 2 Lev., 211; 1 Freem. 471; T. Jones, 102; T. Ray, 302; Bourne *vs.* Mason, 1 Vent. 6.

[6] Savile, 23; Latch, 206.

could not be recalled, or its destination otherwise changed by the act of the party by whom it was deposited.[1] Such a rule would allow the third party to maintain an action only when the party to whom the promise was made was under some legal obligation to him. But even under the operation of this rule, the beneficiary could enforce the trust in equity without a prior revocation.[2] The debtors of an insolvent party, having with his assent agreed with his creditors to satisfy their claims against him, were held liable to the suit of the creditors, the arrangement between all the parties operating to render the amount due to the insolvent money had and received to the use of the creditors.[3] Even the simple promise of the party who has agreed to confer the benefit, repeated to the beneficiary himself, has been considered sufficient to render the latter privy to the agreement.[4]

The necessity of the beneficiary's proving his privity to the contract is now generally dispensed with, at least in this country. The doctrine for which there are early precedents, and which has always been law in Massachusetts since the first publication of her reports, that where one person makes a promise on a valid consideration for the benefit of a third person, although such third person has in no wise contributed to the consideration, either the party to whom the promise was made or the party for whose benefit it was made may maintain an action thereon, each in his own name, is affirmed by the mass of later authorities.[5] In one or two early cases the right

[1] Seaman *vs.* Whitney, 24 Wend., 260; Williams *vs.* Everett, 14 East, 582; Tiernan *vs.* Jackson, 5 Peters, 595, 601. See distinctions taken in Blymire *vs.* Boistle, 6 Watts, 182; Harvet *vs.* Lewis, Hetl. 176; Owings *vs.* Owings, 1 H. & G., 484; Hammond on Parties, (11 Am. Ed.,) 101.

[2] 2 Story Eq. Juris, §§ 1041, 1044.

[3] Wilson *vs.* Coupland, 5 B. & Al., 228; Tipper *vs.* Becknell, 3 Bing. N. C., 710; Parsons on Cont., 187, 192.

[4] But this must be confined to those cases where the third party is the creditor of the depositor of money. Wyman *vs.* Smith, 2 Sandf., 331.

[5] Savile, 23; Hardr. 321; 1 Roll. Abr., 37, pl. 25; 32, pl. 13; 1 Viner Ab., 334–5; Com. Dig. Ass., (E.) Yelv. 25; Feltmakers *vs.* Davis, 1 B. & P., 101, note; Martyn *vs.* Hind, Cowp., 443; Lilly *vs* Hayes, 5 A. & E., 550; Felton *vs.* Dickinson, 10 Mass., 287; Hall *vs.* Maiston, 17 Id., 571; Arnold *vs.* Lyman, Id., 400;

of action was conceded to the beneficiary alone.[1] But if the contract be under *seal*, the third party, for whose benefit it was made, cannot sue upon it in his own name.[2]

§ 16.—If the beneficiary or third party is the creditor of the party to whom the promise was made, and has not accepted the promisor as a new debtor in his stead, on general principles he would be allowed to sue his original debtor. It is evident also, that if the promisee was not indebted to the beneficiary at the time of the deposit, or the debt for the discharge of which it was made, had ceased to exist, or still existing, the beneficiary had not accepted the promisor in lieu of the promisee as his debtor in either and all of these cases, the depositor could recover the money of the party to whom he delivered it, if he had not already paid it over, at least, before any engagement had been entered into by him with the beneficiary to hold it for his benefit.[3]

§ 17.—It is said that in the case of a promise to A. for the benefit of B., and an action brought by B. to enforce it, the promise must be laid as being *made to* B., and the promise actually made to A. may be given in evidence to support the declaration.[4] But the contrary rule which allows the promise to be stated according to the *fact*,

Carnegie *vs.* Morrison, 2 Met, 401-4; Beers *vs.* Robinson, 9 Barr, 229; Hind *vs.* Holdship, 2 Watts, 106; Hassenger *vs.* Solmes, 5 S. & R. 4; 8 Johns., 258; 12 Id., 276; Shear *vs.* Mallory, 13 Id., 496; Berly *vs.* Taylor, 5 Hill, 577; The Del. and H. Canal Co. *vs.* Westchester Co. Bank, 4 Denio, 97; 1 Cranch, 429; Hinkley *vs.* Fowler, 15 Maine, 285; Lucas *vs.* Chamberlain, 8 B. Monroe, 76; Belt *vs.* McLaughlin, 12 Miss., 433. So a promise to three, on a consideration moving from them and a fourth person, will support an action brought by three. Cabot *vs.* Haskins, 3 Pick., 83.

[1] Hadres *vs.* Levet, Hetl., 176; S. C. Cro. Eliz., 619, 652; Dutton *vs.* Poole, T. Jon., 102.

[2] Hinkley *vs.* Fowler, 15 Maine, 285; Yelv., 177, note; Sanders *vs.* Filley, 12 Pick., 554; Johnson *vs.* Foster, 12 Met., 167.

[3] Carnegie *vs.* Morrison, 2 Met. 402; 2 Story Eq. Juris. § 10, 45-6. Even an accepted order requires a consideration for the acceptance to render it binding. Davis *vs.* McGrath, 10 Barr 170; Ford *vs.* Adams, 2 Barb. 349. The topic of novation to which this point belongs, is well treated in Parsons on Contracts, pp. 187, 192.

[4] Feltmakers *vs.* Davis, 1 B. & P. 102; Eyre, C. J. Lawes' Assumpsit, 93, 97; 22 Am. Jur. 18.

or its *legal effect* is more just and liberal, and is sustained by early authorities as well as by one quite recent.[1] When a party contracts as agent, and avows himself acting as such, he cannot, except in some peculiar cases, bring the action, the consideration actually moving from the principal, and the promise being constructively made to him.[2]

§ 18.—Having now reviewed the general doctrines of a consideration, its analogies, its reason and policy, and examined it in its relation to the contract, determining what contracts require it, the mode of proving it, the parties to it, and their rights of suit, we are now to determine what is necessary to its *validity*, classifying such considerations as are sufficient and such as are insufficient in law to sustain a contract. And first:

§ 19.—*The amount of a consideration required.*—The consideration need not be adequate.[3] In other words, a valid contract may subsist between parties by which the something to be given or done by the one is far from being an equivalent in intrinsic value to the thing to be given or done by the other. This doctrine has been stated in very strong terms by the courts. It has been said, "The law does not weigh the quantum of the consideration." "The least spark of of a consideration will be sufficient."[4] "Any gain to the promisor

[1] Dutton *vs.* Poole, 2 Lev. 210; S. C. T. Jones, 102; T. Ray, 302; The Del. and H. Canal Co. *vs.* Westchester Co. Bank, 4 Denio, 97; See Bell *vs.* Chaplain Hadr, 321: where the promise in such case, it is said, *must* be laid according to the *fact.*

[2] Chitty Cont. 54; Story Agency, §§ 40–3, 410; Bickerton *vs.* Burrell, 5 M. & S. 383.

[3] Whitfield *vs.* McLeod, 2 Bay, 380; Knobb *vs.* Lindsay, 5 Ohio, 468; Stewart *vs.* The State, 2 H. & G. 114; Bainbridge *vs.* Firmston, 1 P. & D. 2; Skeate *vs,* Beall, 11 A. & E. 992; Oakley *vs.* Boorman, 21 Wend. 593. Annuities cannot be set aside for inadequacy of consideration, 8 Ves. 133; McGee *vs.* Morgan, 2 Sch. & Lef. 395; Floyer *vs.* Sherard, Amb. 18; Speed *vs.* Phillips, 3 Anst. 732. It is now no objection to a contract in lawful restraint of trade: Hitchcock *vs.* Coker, 6 A. & E, 438, 456; Sainter *vs.* Ferguson, 7 C. B. 716; Pierce *vs.* Fuller, 8 Mass. 223.

[4] Pillans *vs.* Mierop, 3 Burr, 1666, 1663; Per Wilmot, J. Austyn *vs.* Mc Lane, 4 Dall. 225; 3 Penn. 282; Whitney *vs.* Stearns, 16 Maine, 397; Sanborn *vs.* French, 2 Foster, N. H. 246.

or loss to the promisee, however trifling, is a sufficient consideration to support an express promise."[1]

§ 20.—The general doctrine of a consideration, we have seen, is founded on the established principles of public policy.[2] The rule of law which prohibits Courts in all ordinary cases from inquiring into its *value* or *amount* is sound in reason, and expedient in practice. The price or exchangeable value of a thing is not governed solely by its intrinsic value, but depends upon contingencies which hardly two men will weigh alike. These fluctuate every day, and are regulated by no unvarying standard. A sentiment may be attached to an article generally esteemed of trivial value, which may render it priceless to some. It would be impracticable for any human tribunal to revise contracts with the view of equalizing the obligations imposed on both parties, and impossible, for their motives could not be balanced. None could stand and none could be made—if thus subjected to the scrutiny of courts. To use the bold metaphor of an English Judge, "if they were to unravel all such transactions, they would throw everything into confusion, and set afloat the contracts of mankind."[3] For reasons like these, it has become a settled doctrine of the Common law, binding in general on Courts of law and equity, to which there are analogies in other systems of jurisprudence, that a promise will be enforced, founded on a consideration consisting of the slightest benefit to the maker, or the slightest damage to the party to whom it is made.[4] Thus, a promise to pay a sum of money if the person to whom it is made will go before a

[1] Train *vs.* Gold, 5 Pick. 384; Hubbard *vs.* Coolidge, 1 Met. 93; Mansfield *vs.* Corbin, 2 Cush. 151.

[2] Ante, § 3.

[3] Griffith *vs.* Spratley, 1 Cox, 383. Per Lord Ch. Baron Eyre.

[4] See cases cited ante § 19. The law of Scotland is the same. Erskine's Inst. Bk. 4, Tit., 1. § 27. The rule of the civil law is the same relative to personal property. Domat. Bk. I., Tit. 2, §§ 3, 9, art. 1; Pothier (Evans) 33, 34, note. But as regards real property, the sale was set aside, if the purchase money was less than one-half of the whole value. Domat. Bk. I., Tit. 2 § 9; 1 Story Eq. Jur. § 247–8–9.

magistrate and make oath or affidavit that it is due to him[1] or procure an order from a third person directing its payment,[2] or call for it at a particular time[3]—or prove it to be due him before a legal tribunal[4]—or deliver up a letter or other document in his lawful possession[5]—or show a deed[6]—or merely endeavor to do any lawful service,[7] is binding when the condition is performed.[8] The sale of a chattel, which turns out to be utterly worthless, is a sufficient consideration—there being no fraud or warranty.[9] But the stipulated consideration must consist of some benefit to the one party or injury to the other, either actual or possible, and the grant of a mere estate at will or the performance of a legal duty by the promisee will not satisfy the requirement of the law.[10]

§ 21.—But to the rule that inadequacy of consideration is no objection to a contract, there are some important qualifications or explanations which must not be passed over. It is a very prominent fact in connection with circumstances of distress, improvidence or mental incompetency, from which fraud may be presumed, so as to avoid a contract and induce a court of equity to set it aside when executed.[11] But if fraud is not charged, or if charged is disproved,

[1] Bretton *vs.* Prettiman, T. Ray, 153, S. C. 2 Keb. 26, 44; 1 Sid. 283, Peake Cas. 187; Amy *vs.* Andrews, 1 Freem. 133, S. C., 1 Mod. 166, Cro. Eliz. 469; and the truth of the affidavit cannot be disputed. Brooks *vs.* Ball, 18 Johns, 337. But see 11 Vt. 166. As to the force of promise to pay what a third person shall say is due, see 1 Greenl. Ev. §§§ 182, 183, 184.

[2] Bockenham *vs.* Thacker, 2 Vent. 71, 74.

[3] Train *vs.* Gold, 5 Pick., 384.

[4] Traverse *vs.* Meres, 1 T. Ray, 32, 153; Layworthy *vs.* Chicester, 1 Freem. 52.

[5] Wilkinson *vs.* Oliveira, 1 Bing. N. C. 490; Haigh *vs.* Brooks, 10 A. & E., 309, 323, S. C., 2 P. & D., 477, 4 Id. 288. *Aliter*, if the possession is not lawful. Pothier, 43; McDonald *vs.* Neilson, 2 Cowen, 141; McCaleb *vs.* Price, 12 Ala. 753.

[6] Train *vs.* Gold, 5 Pick., 384.

[7] Aglionby *vs.* Towers, 1 Freem. 399; Lampleigh *vs.* Braithwaite, Hob. 88; Trustees of Hamilton College *vs.* Stewart, 1 Comst. 581.

[8] Com. Dig. Ass. B. 21 Am. Jur., 267–9.

[9] Johnson *vs.* Titus, 2 Hill, 606.

[10] 1 Roll. Abr. 23, pl. 29; Harris *vs.* Watson, Peake, 72; Festerman *vs.* Parker, 10 Iredell, 474; Robinson *vs.* Threadgill, 13 Id. 39, Pothier (Evans) 43–46.

[11] Griffith *vs.* Spratley, 1 Cox, 383; Copis *vs.* Middleton, 2 Mad. 409, 431; Prebble *vs.* Boghurst, 1 Swanst. 329; Gwynne *vs.* Heaton, 1 Bro. Ch. 5; 1 Story Eq. Juris. § 246.

inadequacy of consideration alone, however great, will not justify the intervention of equity.[1] If it is gross,[2] or relations of peculiar confidence existed between the parties,[3] the presumption of fraud is more easily raised. And although mere inadequacy will not justify equity in setting aside a contract, it will prevent a decree of specific performance,[4] and according to the weight of authority will avoid purchases from young heirs of their reversionary interests.[5] Reasonable damages only, without regard to those stipulated by the parties, have been allowed by courts of law in a few instances of unconscionable agreements, even though no actual fraud could be presumed from the circumstances.[6] The rule which does not permit the adequacy of the consideration to be inquired into, does not apply to contracts which are made to defraud or prejudice the rights of third persons, although they are valid between the contracting parties.[7]

§ 22.—*Considerations classified.*—A consideration may be created by any thing which may be a benefit to the promisor or an injury to the promisee, and may consist of labor done, money paid, advances made, credit given, liability or risk incurred, the forbearance or discharge of an existing debt, the transfer of any property, real or personal, or of any right or interest therein. The classification of considerations in the civil law has passed into the books of the com-

[1] See cases cited in the preceding note.

[2] Mott *vs.* Atwood, 5 Ves. (Sumner ed.) 845, and cases cited in the notes; Hollett *vs.* Rose, 3 McLean, 332.

[3] Crowe *vs.* Bullard, 1 Ves. jr. (Sumner ed.) 215, note (2); Mortlock *vs.* Buller, 10 Id. 291; Ormond *vs.* Hutchinson, 16 Id. 107; Robinson *vs.* Schly, 6 Geo. 515; 1 Story Eq. Juris. § 246.

[4] Mortlock *vs.* Buller, 10 Ves. 292; Watkins *vs.* Collins, 11 Ohio 31; Osgood *vs.* Franklin, 2 Johns. Ch. 1–23, where the conflicting cases are reviewed and the doctrine of the text held. But see Coles *vs.* Trecothick, 9 Ves. 246.

[5] Coles *vs.* Trecothick, 9 Ves. 234; Evans *vs.* Peacock, 16 Id. 512; Gowland *vs.* De Faria, 17 Id. 20; Osgood *vs.* Franklin, 2 Johns. Ch. 25.

[6] James *vs.* Morgan, 1 Lev. 111; Thornborow *vs.* Whiteacre, 2 Ld. Ray. 1164; 8 Mass. 257; 12 Id. 365; 1 Story Eq. Juris. § 331; Sedgwick on Damages, Ch. vii. pp. 215–6.

[7] Chitty, Cont. 28.

mon law, but is of little service in practice.[1] Such as are valid and such as are invalid in the common law will now be classified.

§ 23.— *Valid considerations classified—Mutual Promises.*—Mutual promises are mentioned in the books as a distinct class of considerations, and are sometimes called *concurrent* considerations.[2] They designate, however, all contracts except those founded on executed considerations, and apply to all in which something is to be done by each party in the future, although immediately after the contract is made. They are exemplified by mutual promises to marry,[3] to buy and sell goods,[4] to forbear a debt and to become security for its payment.[5] They constitute a contract, as soon as the minds of the parties have met, and before either has begun to perform his promise. It would seem that the thing promised—although to be given or done in the future—rather than the promise itself constitutes the consideration, there being no benefit in a mere promise. Mutual promises are said to constitute a consideration in those cases where its performance is not a condition precedent to the enforcement of the promise, as where the day appointed for payment must or may happen before the act is to be performed for which the payment is the consideration; or where no time is fixed for the performance of that which is the consideration of the payment or other act to be done at a certain time.[6]

[1] *Do ut des*—where I give something that you may give something to me. *Facio ut facias*—where I do something that you may do something for me. *Facio ut des*—where I do something that you may give something to me. *Do ut facias*—where I give something that you may do something for me, 2 Bla. Comm. 444.

[2] Chitty, Cont. 65; Nichols *vs.* Reynolds, Hob. 88; Livingston *vs.* Rogers, 1 Caines, 584; Tucker *vs.* Woods, 12 Id. 190; Flannery *vs.* Dechert, 13 Penn. State, 505.

[3] Harrison *vs.* Cage, 5 Mod. 412, S. C.; 12 Id. 214; Wightman *vs.* Coates, 15 Mass. 1.

[4] Cro. Eliz. 543, 708, 888, 8 Johns. 304; Howe *vs.* Onally, 1 Murph. 287; Appleton *vs.* Chase, 19 Maine, 74.

[5] See *post*, § 27.

[6] Pordage *vs.* Cole, 1 Saunders (Williams), 324, note (4), and cases cited; Couch *vs.* Ingersoll, 2 Pick. 300; Quarles *vs.* George, 23 Id. 400; Babcock *vs.* Wilson, 17 Maine, 372; Pitkin *vs.* Fink, 8 Met. 12.

§ 24.—Mutual promises, to constitute a valid contract, must be mutually binding—excepting those between adults and infants, where the contract can be annulled by the infant, but not by the adult.[1] Thus a written agreement to submit disputes to arbitration, is not binding till all the parties have signed it, and are thus equally bound by it.[2] The main question here is to determine when the parties are mutually bound. Suppose I say to you, if you will furnish goods or money to a third person, I will see you paid; or if you will employ him as your agent, I will be responsible for his fidelity—and here, if you perform the condition within the time my security is presumed to be offered and before it is withdrawn, I am bound.[3] But until you have performed the condition, or agreed to perform it, my offered guaranty is moveable. A simple offer by one party to sell land or merchandise to another, or buy of him, whether at public auction or private sale, is without consideration and may be withdrawn.[4]

But, if the offer is accepted at the time before it is retracted, or if a specified period is fixed within which it is to continue, and within that period it is accepted—not having been previously withdrawn—such offer and acceptance constitute a valid contract. In the latter case the offer is extended through the limited time, and, unless previously retracted, makes up with the acceptance a contract.[5] It is sometimes said that the offer is binding if accepted within a *reasonble time* after it is made, not having been previously withdrawn. To us it seems more correct to say that the offer binds if accepted before actual revocation notified to the offeree, and within the period

[1] Ward *vs.* Clarencieux, 2 Stra. 938; Willard *vs.* Stone, 7 Cow. 22; Cannon *vs.* Alsbury, 1 Marsh, 76.

[2] Chitty Cont. 46; Kingston *vs.* Phelps, Peake, 299; Biddell *vs.* Douse, 6 B. & C. 255; Antram *vs.* Chase, 15 East. 212.

[3] Morton *vs.* Burns, 7 A. & E. 23; Kennaway *vs.* Treleavan, 5 M. & W. 501; Barnes *vs.* Perine, 9 Barb. 210.

[4] Payne *vs.* Cave, 3 T. R. 148. An agreement to give the refusal of a farm by the owner without the agreement of the other party to buy, is not binding: Barnet *vs.* Bisco, 4 Johns. 235; Getman *vs.* Getman, 1 Barb. Ch. 499.

[5] Bean *vs.* Burbank, 16 Maine, 480; The Boston and Maine R. R. *vs.* Bartlett, 3 Cush. 224; 20 Am. Jur. 17.

during which it may be presumed to continue. If a period is fixed, that is the presumed time.[1] If it is not, all the circumstances of the case must determine the presumption. A more extended consideration of this point would lead us further into the topic of mutual assent than one subject will allow.

§ 25.—*Marriage.*—An agreement between parties to marry, as we have seen, is founded on a valid consideration;[2] and marriage between them is a valid consideration for the promise of either to make a settlement on the other, or of a third person to perform any act beneficial to either or both.[3]

§ 26.—*The assignment of a right of action.*—The assignment of a *chose in action* transfers the right to the assignee, and is a valid consideration for a promise[4]—except in a few anomalous cases where it is forbidden by public policy. It does not authorize the assignee, except of negotiable paper, to sue in his own name at law unless the debtor promises the assignee to pay him, or previously assents to the assignment.[5] He must bring the action in the name of the assignor at law—but in equity he can sue in his own;[6] and the assignor will not be permitted to defeat his right.[7] The assignment of possibilities and contingencies without a present interest, not ordinarily assignable at law, may be enforced in equity.[8] If the

[1] The expressions in some of the cases that mutual promises, to be binding, must be made simultaneously or at the same instant (Nicholson *vs.* Reynolds, Hob. 88; Livingston *vs.* Rogers, 1 Caines, 584) are only correct as modified by the text.

[2] Wightman *vs.* Coates, 15 Mass. 1.

[3] Sterry *vs.* Arden, 1 Johns. Ch. 261; Bradish *vs.* Gibbs, 3 Id. 523; Frazer *vs.* Western, 1 Barb. Ch. 523; Armfield *vs.* Armfield, 1 Freem. Ch. (Miss.) 311; Gurvin *vs.* Chromartie, 11 Iredell, 174; even against creditors, Newburyport Bank *vs.* Stone, 13 Pick. 420.

[4] Cone Dig. Ass. (B.) 3; Price *vs.* Seaman, 4 B. & C. 528. Mouldsdale *vs.* Birchall, 2 W. Bl. 820; Page *vs.* Thrall, 2 Vt. 418; Warren *vs.* Wheeler, 21 Maine, 484; Edson *vs.* Fuller, 2 Foster, (N. H.) 183.

[5] Baron *vs.* Husband, 4 B. & Ad. 611; Crocker *vs.* Whitney, 10 Mass. 316; Mowry *vs.* Todd, 12 Id. 281; Coolidge *vs.* Ruggles, 15 Id. 387; Gibson *vs.* Cook, 20 Pick. 18; Parkhurst *vs.* Dickerson, 21 Id. 310.

[6] 2 Story Eq. Juris. §§ 1056, 1057.

[7] Manderville *vs.* Welch, 1 Wheat. 235; S. C. 5 Id. 283.

[8] 2 Story Eq. Juris. § 1040, a. b. c. d. e. f. g.

assignment is to the government, the name of the assignee may be used in a suit even at law.[1] No assignment which transfers the rights of seamen in prizes,[2] or savors of maintenance or any illegality is a valid consideration.[3] The maker of a note waives no defence, which existed prior to its assignment, by his promise to the assignee to pay it.[4]*

Cincinnati, O. E. L. P.

RECENT AMERICAN DECISIONS.

In the Circuit Court of the United States, Western District of Pennsylvania. November Term, 1853.

GARRET VAN METTER *vs.* ROBERT MITCHELL.

An action lies at Common Law in a free State by the owner of a fugitive slave, against one who knowingly harbors and conceals the latter; and the Act of Congress of 1793, has not destroyed this right. Jones *vs.* Van Zandt, 2 McLean, 603, dissented from.

This was a motion in arrest of judgment.

The opinion of the Court was delivered by Judge IRWIN.

The declaration contains two counts for damages for injuries, in substance as follows: "That a certain negro, called Jared, who, by the laws and customs of Virginia, was held to service and labor in that State, by the plaintiff; on the first of September, 1845, left the said service and labor, fled, and escaped into the Western District of Pennsylvania; that he was pursued by the plaintiff, with the intent of recapturing him; but that the defendant, well knowing the premises, and with the intent of preventing the plaintiff from arresting the fugitive, and removing him to Virginia, concealed and harbored him, thereby enabling the said fugitive to escape from the labor and service to which he was lawfully held, by means of which, his said labor and service became totally and entirely lost to the

[1] Moore, 701; S. C. Cro. Eliz. 633; United States *vs.* Buford, 3 Peters, 13.

[2] Usher *vs.* De Wolfe, 13 Mass. 290.

[3] Prosser *vs.* Edmunds, 1 You. & Col. 481; Mouldsdale *vs.* Birchall, 2 W. Bl. 820.

[4] 1 Ala. N. S. 626.

* We shall publish the second part of this article in our next number.